



June 18, 2002

Ms. Ann Bright  
Section Chief  
Legal and Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
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OR2002-3314

Dear Ms. Bright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163842.

The Texas Department of Insurance (the "department") received a request for fourteen categories of information regarding viatical and life settlements; Conseco, Incorporated; and Kelco, Incorporated. You state that you are willing to allow the requestor to inspect some of the requested information. You inform us that you are withholding certain examination reports, work papers, and related information in accordance with a previous determination of this office. *See* Open Records Letter No. 99-1264 (1999) (concluding that department could rely on Open Records Decision No. 640 (1996) as previous determination). You claim that the information you have submitted for our review is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a). This office has determined that a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, constitutes litigation for the purposes of section 552.103. See Open Records Decision No. 588 at 7 (1991).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986).

The department is charged with regulating the insurance industry. See Ins. Code art. 1.10. In particular, the department is responsible for investigating allegations of insurance fraud and taking disciplinary action against persons found to have engaged in fraud. *Id.* art. 1.10D § 2. These duties and responsibilities extend to persons engaged in the business of viatical or life settlements. See *id.* art. 3.50-6A § 3. You state that the submitted open case files relate to ongoing investigations being pursued by the department's Legal and Compliance Division and that the department anticipates initiating administrative litigation in all of these files. Based on your representations and our review of the submitted information, we conclude that you have demonstrated that the open case file information relates to anticipated litigation involving the department for the purposes of section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In this instance you state that “[e]ach company that is the subject of these cases will be a party to anticipated administrative litigation” and indicate that these companies have not had access to each other’s information. Based on your representation, we conclude that the department may withhold the open case file information at this time pursuant to section 552.103 of the Government Code.<sup>1</sup>

We next address the closed case files. Initially we note that one of the closed files contains a search warrant affidavit. An affidavit to support a search warrant is made public by statute if the search warrant has been executed. *See* Code Crim. Proc. art. 18.01(b). If the submitted search warrant has been executed, the department may not withhold the supporting affidavit from required public disclosure. *See generally* Open Records Decision No. 525 (1989) (stating that Public Information Act’s exceptions do not, as a general rule, apply to information made public by other statutes).

You assert that the closed files constitute attorney work product that is excepted from disclosure by section 552.111 of the Government Code. We note, however, that the submitted closed case files constitute completed investigations made of, for, or by the department. Under section 552.022 of the Government Code, this information must be released unless it is expressly made confidential under other law or excepted from disclosure under section 552.108 of the Government Code. *See* Gov’t Code § 552.022(a)(1). Section 552.111 of the Government Code is a discretionary exception under the Public Information Act and does not constitute “other law” for purposes of section 552.022. Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). Therefore, we will not address your arguments under section 552.111.

However, the attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 192.5.

An attorney’s core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from

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<sup>1</sup> Please note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1993, no writ).

You have provided an affidavit stating that the closed files "were opened with the intent of pursuing administrative litigation" and that the "information contained in the closed files was assembled in preparation for such litigation." We therefore find that you have satisfied the first prong of the work product test. Furthermore, you state that the "extremely broad" request "encompasses [department] attorneys' entire litigation files" and assert that, even though some documents in the closed files do not themselves constitute attorney work product, the core work product privilege nevertheless applies because the release of these documents would "reveal the organizational tactics, mental processes, and conclusions used by [department] attorneys in developing cases concerning viatical settlements." The Texas Supreme Court has stated that the organization of an attorney's litigation files, as well as the decision as to what to include in them, necessarily reveals the attorney's thought processes concerning the cases. *See National Union Fire Insurance Co. v Valdez*, 863 S.W.2d 458, 461 (Tex. 1993). Thus, after reviewing your arguments and the submitted information, we agree that, in this instance, the attorneys' decisions to include certain documents in the closed files reveals the attorneys' thought processes concerning the litigation. We therefore find that the department has satisfied the second prong of the work product test and may withhold the closed files from disclosure pursuant to rule 192.5 of the Texas Rules of Civil Procedure.

We turn now to the complaints that are not part of a case file. We first address your assertion that the "reviewing physician's affidavits" constitute medical records subject to the Medical Practices Act (the "MPA"). Occ. Code §§ 151.001-165.160. Section 552.101 of the Government Code excepts from disclosure information made confidential by other statutes. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 59.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

This office has concluded that the term "medical records" within the meaning of section 159.002 includes only records created either by a physician or by someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical record information may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Having reviewed the affidavits, we agree that they constitute evaluations of patients created by a physician and are therefore subject to the MPA. Therefore, the department must withhold these records unless the MPA authorizes their release.

You assert that other information you have marked in the complaints is also made confidential by law. The complaints at issue concern viatical or life settlements. A viatical settlement is an agreement "under which a person pays compensation . . . that is less than the expected death benefit of a policy insuring the life of an individual who has a catastrophic or life-threatening illness or condition in return for the policy owner's or certificate holder's assignment . . . of the death benefit under or ownership of the policy." Ins. Code art. 3.50-6A § 1(2). A life settlement is essentially the same type of transaction but the person whose life is insured does not have a catastrophic or life-threatening illness or condition. *Id.* § 1(3). Article 3.50-6A of the Insurance Code was adopted, in part, to "provide consumer protection for a person who may sell or otherwise transfer the person's life insurance policy." *Id.* § 2(a). The article provides that the department must adopt rules for its implementation including a rule governing "the maintenance of appropriate confidentiality of personal and medical information." *Id.* § 3(c)(7).

Under the aegis of article 3.50-6A the department adopted section 3.1714 of title 28 of the Texas Administrative Code, which provides in pertinent part:

(a) All confidential information solicited or obtained by a viatical or life settlement provider, provider representative, or broker about a viator, life settlor or owner, including the viator's, life settlor's, or owner's identity or the identity of family members, a spouse or a significant other, is confidential and shall not be disclosed in any form to any person, unless disclosure:

(1) is provided by prior written consent from the viator, life settlor, or owner on a form which identifies to whom the confidential information may be released, and the purpose for releasing the confidential information;

(2) is provided to the department in the form of statistical data from which the identity of the viator or life settlor and owner cannot be ascertained;

(3) is provided to the department in response to a subpoena from the commissioner, pursuant to the enforcement powers made applicable by Insurance Code Article 3.50-6A, and §3.1716 of this subchapter (relating to Denial, Suspension, or Revocation of Certificate of Registration; Enforcement), or in response to a written request for information made pursuant to Insurance Code §38.001; or

(4) is provided to the department during the course of an examination by the department of the business and affairs of the viatical or life settlement provider, provider representative, or broker, as provided in §3.1717 of this subchapter (relating to Examinations).

....

(c) *A viatical or life settlement provider, provider representative, or broker shall not release* any viator's, life settlor's, or owner's confidential information to any person without first making a factual determination that:

(1) the releasing of any confidential information to that person is not in violation of any applicable provisions of the laws of this state, or of the United States, relating to the confidentiality of information;

(2) all persons to whom any confidential information is disclosed will maintain viator or life settlor and owner;

(3) all persons to whom any confidential information is released, have sufficient procedures implemented to prevent the accidental or unauthorized release of any viator's or life settlor's and owner's confidential information; and

(4) the viatical or life settlement provider, provider representative, or broker is not violating any law of this state or the United States by engaging in business with persons to whom it is releasing the confidential information of any viator, life settlor, and owner.

....

(e) *Confidential information obtained by the commissioner pursuant to the subpoena powers set forth in §3.1716 of this subchapter, is protected by the confidentiality provisions of either Insurance Code Article 1.10D or §§36.151 - 36.159 depending on which provision is used to subpoena the information.*

(f) All confidential information solicited or obtained by a viatical or life settlement provider, provider representative, or broker about a viator, life settlor, or owner shall be further subject to applicable provisions of the laws of this state and of the United States.

28 T.A.C. § 3.1714 (emphasis added).

You assert that the information you have marked in the complaints is made confidential by this section. We disagree. In general, section 3.1714 makes confidential information solicited or obtained by a viatical or life settlement provider or its agents and prohibits *the provider* from releasing such information except under certain circumstances. *See id.* § 3.1714(a)-(c); *see also id.* § 3.1702 (defining settlement provider). When the department subpoenas confidential information from a provider, this section provides that such information retains its confidentiality. *Id.* § 3.1714(e). You do not claim that the submitted information was subpoenaed from a viatical or life settlement provider. Instead, the submitted information indicates that it was voluntarily provided to the department by complainants who had purchased “settled” policies from the providers and were seeking the department’s aid in addressing their claims against the named providers. Under these circumstances, we find that you have failed to demonstrate that section 3.1714 applies to the documents at issue. Therefore, you may not withhold any of the marked information under section 552.101 in conjunction with the Insurance Code and department rules.

You assert that the social security numbers in the submitted complaints are excepted from disclosure under section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act make confidential a social security number that was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). The social security numbers at issue were obtained from the applications of persons wishing to engage in the business of viatical or life settlements. You argue that “[s]ince the application was adopted pursuant to the authority granted the Commissioner under article 3.50-6A, the social security numbers were provided pursuant to a law enacted after October 1, 1990, and are therefore confidential.” We disagree. Neither article 3.50-6A, which requires such persons to register, nor section 3.1703 of the Texas Administrative Code, which requires such persons to complete the department’s application, specifically requires an applicant to provide a social security number. Accordingly, we do not find that

these social security numbers were obtained or are maintained pursuant to either of these provisions for purposes of the federal law.

You also assert that these social security numbers are excepted from disclosure under 552.136 of the Government Code. Section 552.136 makes confidential "a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body." This section defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to: (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." You argue that "[a]t some banks and other financial institutions, account holders use social security numbers, either alone or in conjunction with another access device, to conduct financial transactions." After reviewing your arguments, we are not persuaded that the social security numbers contained in the complaints are confidential under section 552.136 of the Government Code. Accordingly, the department may not withhold these social security numbers on the basis of that provision.

You also assert that the social security numbers, as well as other information you have marked, are protected by common law privacy. Section 552.101 of the Government Code also encompasses the doctrine of common law privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Id.* We have reviewed the complaint information and determined that some of it is highly intimate and embarrassing and not of legitimate public concern. This information, which we have marked, must be withheld under section 552.101. *See generally* Open Records Decision Nos. 545 (1990) (common law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common law privacy protects assets and income source information). We note, however, this office has long held that social security numbers are not the type of intimate and embarrassing information protected under common law privacy. Open Records Decision Nos. 600 (1992), 169 (1977). Thus, you may not withhold the social security numbers under section 552.101 in conjunction with common law privacy.

Finally, you claim that an e-mail address in the complaints is excepted under section 552.137 of the Government Code. Section 552.137 makes confidential certain e-mail addresses and provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.



(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You inform us that the owner of this e-mail address has not affirmatively consented to its release. Therefore, pursuant to section 552.137, the department must withhold the e-mail address.

In summary, the department may withhold the submitted information that relates to open and closed enforcement cases. The search warrant affidavit must be released if the warrant has been executed. In the complaints that are not part of a case file, the marked medical records must be withheld unless their release is authorized by the MPA. The department also must withhold the email address and the information that we have indicated is protected by common law privacy. All other information from the complaints must be released. As our ruling on these issues is dispositive, we need not address your remaining claims.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

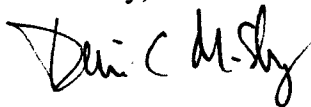
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/seg

Ref: ID# 163842

Enc. Marked documents

c: Mr. Robert C. Webb  
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(w/o enclosures)